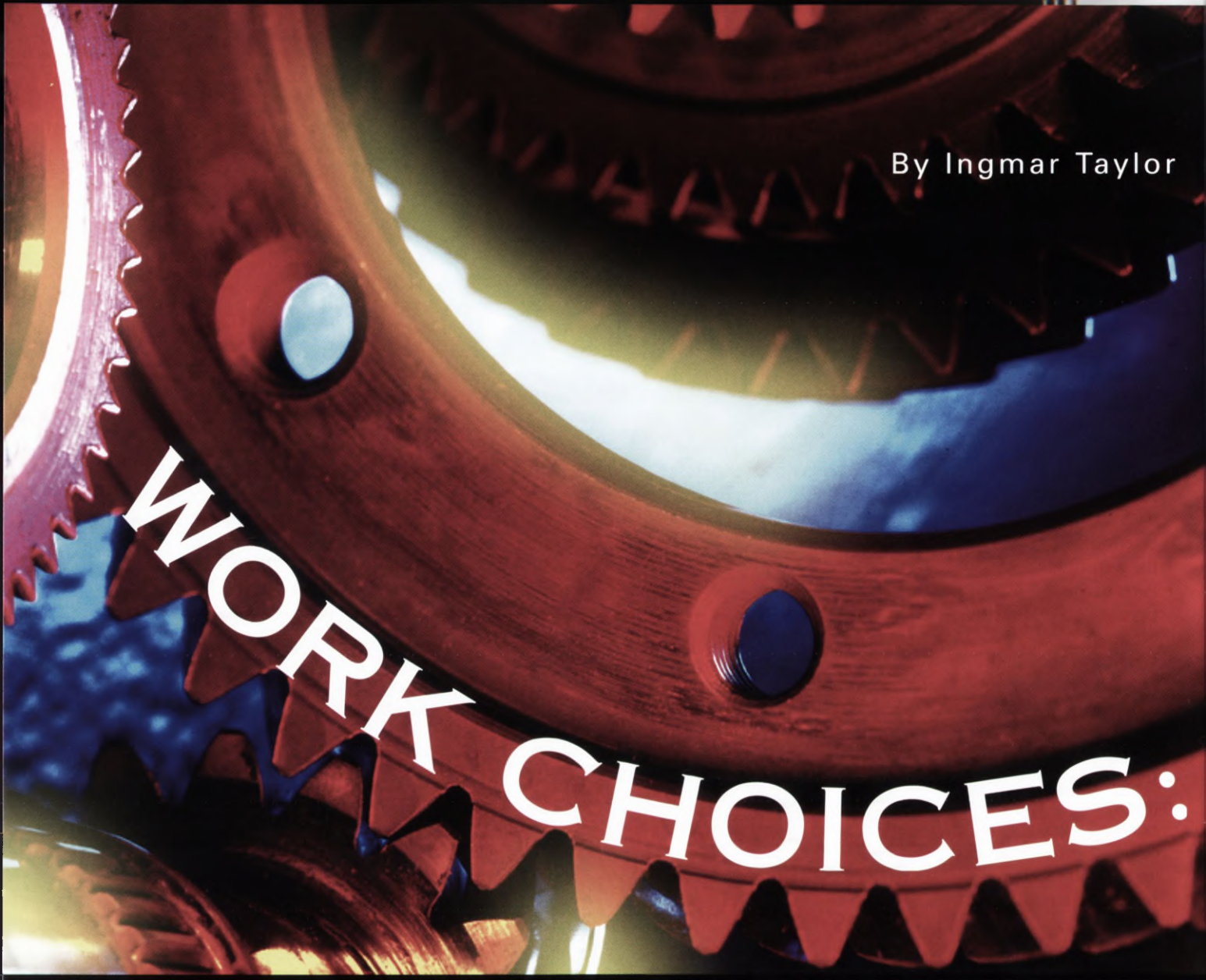

By Ingmar Taylor

WORK CHOICES: A SIMPLER, FAIRER, NATIONAL INDUSTRIAL RELATIONS SYSTEM?

On 27 March 2006, the Federal Government's *Work Choices* legislation[1] came into effect, fundamentally altering the industrial relations system that has existed in Australia for over 100 years.

On its introduction, the government described the legislation as creating a 'simpler, fairer national workplace relations system'.[2] Within days of the legislation taking effect, newspapers were reporting stories of employees being dismissed without recourse to unfair dismissal law and being offered their jobs back on lower pay.[3] Divergent views were expressed as to whether the employers in those cases were acting contrary to the new laws. Is the legislation simpler, fairer and national?

NATIONAL?

Australians have rejected six attempts to amend the Constitution to give the Commonwealth power to make national laws with respect to industrial relations.4

The federal government, however, believes that s51(xx) of the Constitution allows it to make 'national' laws on industrial relations: being the power to make laws with respect to 'foreign corporations and trading and financial corporations formed within the limits of the Commonwealth'.

The amending Act seeks to cover all employers who are trading or financial corporations[5] and to override existing state industrial laws so far as they apply to such corporations and their employees.[6]

It has been estimated that, if constitutionally valid, the new federal system will cover between 75 – 85% of all employees in Australia,[7] with the balance covered by state industrial laws and instruments.

Under the specific industrial power in the Constitution,[8] the Commonwealth Parliament established a tribunal in 1904 to deal with interstate industrial disputes. It has existed ever since in various guises, and is currently known as the Australian Industrial Relations Commission (AIRC). The Commonwealth legislation was limited to interstate disputes, as the Commonwealth perceived that it did not have the power to make laws with respect to intrastate disputes.[9] Accordingly, each state established its own industrial relations system, under which state awards were made to cover intrastate disputes and employment conditions of those not dealt with by the federal system.[10] And so, for over 100 years, fair minimum terms and conditions of employment have been determined at both a state and federal level by an independent third party, through a system of compulsory conciliation and arbitration of industrial disputes.

The recent amendments replace that century-old system with a statutory regime that imposes a limited safety net of minimum wages and conditions with a process for limited adjustment of some of those conditions.

Employers that are not constitutional corporations,[11] and are currently covered by federal awards, will remain covered by the federal system for a transitional period of five years.[12]

Corporations that are not 'trading' or 'financial' corporations, and non-corporate employers that were previously covered by state awards, will remain within the state system.

For those employers that are constitutional corporations, the federal legislation purports to override state legislation that applies to employment generally, including laws dealing with unfair employment contracts.[13] If that provision is upheld by the High Court then, for lawyers in NSW, this means that a popular jurisdiction, s106 of the *Industrial Relations Act* 1996 (NSW), will no longer be available where a claim involves an employment contract and the employer is a constitutional corporation.[14]

The constitutional challenge

At the time of writing, the High Court is to hear argument in early May 2006 as to the constitutional validity of the *Work Choices* legislation.[15] A principal ground of the challenge is that s51(xx) of the Constitution does not authorise a law merely because it says 'a corporation shall' or 'a corporation shall not'.[16] Subsidiary questions include whether the law can apply to those employees of a trading corporation who are engaged in non-trading activities: for example, community workers engaged by charities; librarians employed by local councils; and cleaners engaged by companies.

Even if the law is held to be valid, its true reach will take some time to determine given doubts about whether some types of corporation, such as local councils and charities, are 'trading corporations', at least where their 'trading' activities are somewhat peripheral to their existence. However, the mere fact that trading is not the principal reason for the existence of a corporation does not prevent it from being a constitutional corporation: the Western Australian National Football League,[17] the Australian Broadcasting Corporation,[18] the Royal Prince >>

Alfred Hospital[19] and the University of Western Australia[20] have all been found to be constitutional corporations.

SIMPLER?

Whatever else might be said about the legislation, only a brave advocate would submit that the 762 pages of new legislation, 446 pages of regulations and 872 pages of explanatory material make the law 'simpler', especially as so much of the state law remains intact for those not covered by the amended federal legislation.

Indeed, other than in the title of the new regulatory body, one does not find the word 'fair' in any statutory description of its functions or powers.

Awards

It is perhaps ironic that legislation that aimed to implement a 'simplified' system of workplace relations[21] should, on its commencement, immediately more than double the number of relevant industrial instruments.

On 27 March 2006, most[22] existing federal and state awards were split into three separate instruments.

First, insofar as they apply to employers that are constitutional corporations[23] and their employees, federal and state awards were split into two instruments:

1. The pay rates, classifications, casual loading and coverage provisions for each award[24] became a federal instrument known as an Australian Pay and Conditions Standard (APCS), akin to a 'splinter award' that deals only with pay rates, casual loadings and classifications.[25] The newly created body, the Australian Fair Pay Commission (AFPC) will be responsible for varying and revoking APCSs, and for setting new ones; and
2. The balance of each award's conditions became a federal instrument known as a 'pre-reform [federal] award' or a 'notional agreement preserving state award'[26] (minus certain provisions[27]). These will continue to be varied, revoked and set by the Australian Industrial Relations Commission (AIRC).

Insofar as the state and federal awards apply to employers who are not constitutional corporations and their employees, they continue to exist as a third type of instrument:

3. Federal awards will continue to exist as a 'transitional award',[28] minus certain provisions in respect of non-allowable matters.[29] The AIRC will, for a transitional period of five years, continue to exercise its previous conciliation and arbitration function in respect of these awards (but cannot create new awards); existing state awards will also continue to exist as state awards capable of variation by state tribunals.

It is expected that over the coming years the AIRC and the AFPC will consolidate and 'simplify' existing awards and APCSs. However, restrictions preventing the removal of certain minimum conditions that existed on day one[30] will mean that these 'rationalised' awards and pay scales will need to continue to contain or refer to provisions from each of the multiple awards from which they were created.

Statutory minimum conditions

There is a new statutory minimum rate of pay that applies to every adult employee of a constitutional corporation, whether or not they are covered by an award or pay standard, called the FMW (federal minimum wage).[31]

Statutory minimum conditions[32] also apply to all employees (including those who in the past have not been covered by an award) entitling them (if full time) to:

- four weeks' annual leave per year;[33]
- ten days' personal leave (incorporating sick leave) per year;[34] and
- unpaid parental leave on the birth of a child.[35]

Employers covered by the system have an obligation, under the Regulations, to maintain pay records for most employees, setting out details of the appropriate instruments under which the employee receives entitlements; the relevant classification under those instruments; the hours engaged; the hours worked; the basis upon which pay is determined; and the like.[36] Identifying the appropriate instruments, particularly in circumstances where the legislation has created new instruments (as listed above), will of itself be a major task for many employers.

Industrial action

The capacity for negotiating parties to take protected industrial action has been significantly curtailed.[37] Industrial action is now 'protected', and so lawful, only if new secret ballot requirements are met, which have been described as complex and very difficult to comply with.[38] Right of entry for union officials is also significantly curtailed.[39] Civil penalties for breach of the laws have been increased.[40]

FAIRER?

Fairness, of course, is somewhat subjective. What is 'fair' for an employee might be seen as uncompetitive by a small business.

Previously, employers could not employ on conditions that were overall lower than the 'fair' conditions set by awards (the 'safety net'). That has now changed.

Wages

Before the reforms, minimum wages were set and adjusted by the AIRC pursuant to legislation that required it to maintain an 'effective' and 'fair' safety net of minimum wages and conditions.[41] While the AFPC is required to provide 'a safety net for the low paid',[42] the statutory requirement for that safety net to be 'effective' or 'fair' has gone. Indeed, other than in the title of the new regulatory body, one does not find the word 'fair' in any statutory description of its functions or powers.[43]

The AFPC must have regard to 'the capacity for the unemployed and low paid to obtain and remain in employment' and 'employment and competitiveness across the economy'.[44] Commentators have suggested that this focus on employment and competitiveness and the need to ensure that the unemployed are not 'priced out' of the economy are likely to lead to lower wages in real terms in the future.[45]

AWAs

AWAs (agreements between an employer and an individual employee) were first introduced into the federal legislation in 1996. They were not taken up in large numbers, in part because they were valid only if they met a 'no disadvantage' test (that is, they were overall not less favourable than the award).[46] That requirement, however, has now been abolished and no equivalent test reproduced.[47]

Even in their previous incarnation, AWAs were considered by the Committee of Experts of the International Labour Organisation (ILO) to contradict Australia's international labour law obligations,[48] in that the Act encouraged individual agreements over collective agreements and awards.

The changes made by the *Work Choices* legislation exacerbate this breach of international obligations as there are no measures to ensure that employees have the ability to choose between individual agreements and collective agreements.[49] Employees, with only limited exceptions, have less bargaining power than employers. Under the legislation, an AWA can be offered as a condition of employment[50] and made a precondition to obtaining a wage increase.[51]

Agreement-making between employers and employees, or with employee groups or representatives, will now take place not against the safety-net of minimum conditions prescribed by an award, but against a background of the narrow range of minimum wages and conditions prescribed by statute. An award has 'no effect' in relation to an employee while an AWA operates in relation to that employee.[52]

AWAs still cannot set a rate of pay less than the basic hourly rate contained in the relevant award as at the date the legislation took effect. They can, however, remove most other award entitlements, including long service leave, overtime loadings, weekend penalty loadings and redundancy pay.[53]

A further change is that AWAs can now override more generous conditions set out in a collective agreement.[54] This means that an employer can negotiate a collective agreement with a union, but then effectively disregard it by hiring all new employees on AWAs that do not reflect the collective conditions.

On the termination of an AWA, the employee covered by it does not revert to any existing relevant collective agreement or award but to the minimum statutory standards (which are then the basis for negotiation of any further AWA).[55] >>

In the week that the legislation took effect, a juice bar fired – and then rehired – its teenage sales staff on AWAs that cut their take-home pay by about 40%.

On the expiry of a collective agreement, employees can seek to take lawful ('protected') action, but those who are on a current AWA cannot lawfully participate.[56]

Dismissal

Dismissal law has been amended in a manner that reduces the ability of employees to seek to challenge their dismissal. First, existing state laws with respect to unfair dismissal have no effect where the employer is a constitutional corporation.[57] Second, federal unfair dismissal claims cannot be brought if the employer has 100 or fewer employees.[58] Third, a new defence has been added: a dismissal is not unfair if a reason (not necessarily the only reason) for the dismissal was a *bona fide* 'operational reason'.[59]

These exclusions as to who can pursue unfair dismissal claims make the law inconsistent with international labour law obligations.

Dismissal and rehire

There has also been a small but important change in respect of the prohibition against dismissing employees because of their rate of pay. Previously, it was unlawful to dismiss someone where *one* of the reasons for the dismissal was the employee's entitlement to a particular rate of pay under an award or certified agreement.[60] It was pursuant to that law that the Maritime Union successfully obtained injunctions preventing the dismissal of wharfies by Patrick Stevedores.[61] However, following the *Work Choices* amendments it is now unlawful to dismiss an employee only if the *sole* reason for the dismissal is the employee's entitlement to a rate of pay under an industrial instrument.[62] So, if an employer has other (perhaps 'operational reasons') to reduce its workforce, it could take the opportunity to dismiss employees and then offer to rehire some of them on AWAs that cut their pay in a way that does not contravene the statute.

SO IS IT SIMPLER, FAIRER, NATIONAL?

The *Work Choices* legislation is as national as the corporations power allows it to be (which may be not at all if the High Court rules the attempt to rely on the corporations power invalid). The legislation, which will not remove state systems, will at best be only partially 'national'; perhaps a mark of 0.75 out of one.

Simpler it won't be. Certainly not for many years, as it will take time for the changes to take effect, and even then it will remain very complex.

As for fairer? Fairness is a bit like beauty, being somewhat in the eye of the beholder.

In the week that the legislation took effect, a juice bar fired and then rehired its teenage sales staff on individual agreements (AWAs) that cut take their take-home pay by about 40%. Its manager was quoted as saying:[63]

> 'If they don't want to sign they can leave. It's not about what's fair. It's [about] what's right – right for the company.'

This has echoes in the legislation. One object of the Act is to encourage 'a fair labour market' that is 'internationally competitive'.[64] The requirement for employment conditions to be 'fair' is no longer part of the express statutory criteria. The system by which independent tribunals set fair minimum conditions that could not be undermined has been removed. What is considered 'right for Australia' has precedence over what might be considered fair for employees.

Like all radical new laws, its true effect will only be known with the benefit of hindsight. Simpler, fairer, national? Let us hope that the eventual score is better than 0.75 out of 3. ■

Notes: **1** *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) ('Work Choices') contains seven schedules, each containing amendments to the *Workplace Relations Act* 1996 (Cth) (WRA). **2** The Government published a 16-page booklet titled *A simpler, fairer national workplace relations system for Australia.* The first print of that brochure did not have the word 'fairer' in the title. That print was not distributed. **3** See, for example, *Sydney Morning Herald,* 30 March 2006 reporting on the Cowra Meat Works and also on 10 April 2006, reporting on the Pulp/Pow Juice Bar chain. **4** In 1911, 1913, 1919, 1926, 1944 and 1946. **5** The definition of employer is set out in s6(1) of the WRA. The primary meaning of 'employer' is a 'constitutional corporation' meaning a corporation within s51(xx) of the Constitution. **6** See s16. **7** See p129 of the *Workplace Relations Amendment (Work Choices) Bill 2005 Digest,* prepared by the Commonwealth Parliamentary Library, 2 December 2005, No 66, 2005/06. **8** Section 51(xxxv). **9** Due to limitations inherent in s51(xxxv) of the Constitution: see *Australian Boot Employees Federation v Whybrow* (1910) 11 CLR 311 and *R v Kelly; Ex parte Victoria* (1950) 81 CLR 64. It has only been in more modern times, since the High Court decision in *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, that commentators have suggested that s51(xx) might be capable of supporting laws in respect of employment and industrial relations. **10** In 1996 Victoria referred power to the Commonwealth to legislate in respect of industrial relations and from that time it has not had a state industrial relations system. **11** That is, not corporations within the meaning of s51(xx) of the Constitution. **12** Pursuant to Schedule 6. **13** See s16 and the definition of 'state or territory industrial law' found in s4(1). **14** The *Work Choices* amendments do not otherwise affect s106; proceedings in respect of

non-employment work contracts, such as those of independent contractors, are unaffected, at least until the foreshadowed government Bill in respect of independent contractors is introduced into federal parliament. The attempt to oust unfair contract laws is a separate part of the High Court challenge to the legislation. **15** Every state except Tasmania (which with the territories is intervening in support of the states) has filed a writ and a summons alleging that the *Work Choices* legislation is invalid in various respects and as a result should be wholly invalid. The author is one of the junior counsel for the state of NSW. **16** Deane J, *Tasmanian Dam Case* 158 CLR 1 at 270.2 and 272.2. **17** *R v Judges of Federal Court: Ex parte v Western Australian National Football League* (1979) 143 CLR 191. **18** *Sun Earth Homes Pty Limited v Australian Broadcasting Corporation* (1990) 98 ALR 101. **19** *E v Australian Red Cross Society* (1991) 27 FCR 310. **20** *Quickenden v O'Connor* (2001) 109 FCR 243. **21** See s3(b). **22** But not s170MX federal awards, which made up about approximately 600 awards, or 27% of all federal awards. **23** A corporation within the meaning of s51(xx) of the Constitution: see s4(1). **24** There are some exceptions, the most significant of which is that APCSs are not derived from s170MX federal awards: see the definition of 'pre-reform federal instrument' in s90B. **25** Pursuant to Division 2 of Part VA. **26** Schedule 15, Part 3. **27** Minus those provisions in federal awards that are 'non-allowable matters' (see s513 and following) and minus those provisions in state awards that by regulation are deemed 'prohibited content' under clause 37 of Schedule 8. **28** Pursuant to Schedule 6. **29** See Schedule 13, clauses 17-20 and 27. **30** See s190 which prevent APCSs from being adjusted below the pay rates in awards on day one, which will mean that consolidated APCSs will need to continue to preserve the rates and classifications from the awards from which they were created to the extent that such rates are more generous. See s527 and s528 which require rationalised awards to set out certain 'preserved award terms' taken from the awards which they replace, which will mean consolidated awards will need to have addendums setting out those terms and identifying the employees who will be covered by them. **31** See s90P. **32** The 'Australian Fair Pay and Conditions Standard', in Part 7 of the Act. **33** See Part 7, Division 4. Note that strictly the entitlement is to accrue 1/13th of their nominal hours for each four weeks that they work: see s232. **34** See Part 7, Division 5. Note that strictly the entitlement is to accrue 1/26th of their nominal hours for each four weeks that they work: see s246. **35** See Part 7, Division 6. **36** See the Regulations, Chapter 2, Part 19, Division 3. **37** Compare Division 8 of Part VIB and Division 8 of pt VID of the previous Act and Part 9 of the Act. **38** See *Australian Nursing Federation v DLW Health Services Pty Ltd*, Print PR971312, 6 April 2006, Lawler VP. See also the speech by Giudice J, President of the AIRC, to AMMA's national conference in Launceston on 16 March 2006. **39** Contrary to Article 11 of the ILO Freedom of Association and the Right to Organise Convention No. 87, which requires member states to take all necessary and appropriate measures to >>

ensure that workers and employers may exercise freely the right to organise. Article 22(3) of the International Covenant on Civil and Political Rights provides that nothing in the Article shall authorise states party to ILO Convention No. 87 to take legislative measures that would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention. **40** See, for example, s407. **41** See ss88A(d) and 88B(1). **42** See s23. **43** Note, s3(1) does include as an object to obtain a 'fair labour market'. **44** Section 23. **45** See the speech of Giudice J, President of the AIRC, to the AMMA's national conference in Launceston on 16 March 2006. **46** See s170X of the previous Act. **47** Although the five minimum wages and conditions prescribed in the AFPCS prevail over workplace agreements: see s172. **48** See the Report of the Committee of Experts on the Application of Conventions and Recommendations, 93rd Session, ILC, 2005 at http://www.ilo.org, finding that the legislation was contrary to Article 4 of ILO Convention No. 98 in that it is does not promote collective bargaining.

'If they don't want to sign they can leave. It's not about what's fair. It's about what's right – for the company.'

49 Professor Mark Wooden, *Australia's Industrial Relations Reform Agenda*, paper presented to the 34th Conference of Economists, 26-28 September 2005, University of Melbourne. **50** See 400(6). **51** Contrary to ILO Convention No. 98: See Report of the Committee of Experts on the Application of Conventions and Recommendations, 93rd Session, ILC, 2005 at http://www.ilo.org, in respect of ss170WG(1) and 298L in the previous Act, which enabled an employer to offer new employees a job conditional on signing an AWA. This is noted in the November 2005 ICTUR submission to the Senate Employment, Workplace Relations and Education References Committee Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005, from which other aspects of this article which refer to international law are also drawn. **52** Section 349 (except for the protected award conditions or conditions incorporated by reference) (ss354, 355). **53** See s354(2)(c). **54** Sections 348(2) and (3). Under s170VQ(6) of the previous Act, a federal collective agreement overrode any later-made AWA with respect to any inconsistency. That provision has been removed, such that an employer can enter into a collective agreement and then enter into individual agreements that alter the terms of employment for that employee from those set out in the collective agreement. A collective workplace agreement cannot include a term that directly or indirectly restricts the ability of a person bound by the agreement to offer, negotiate or enter into an AWA and any terms of that nature already contained in certified agreements are rendered void: see s356 and s358 and Regulations Chapter 2, Regulation 8.5(8). This would also be contrary to Article 4 of ILO Convention No. 98, in that it is does not promote collective bargaining: see again the *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 93rd Session, ILC, 2005 at http://www.ilo.org. **55** Section 399. **56** See ss440 and 495. **57** See s16(1)(a) and sub-paragraph (b)(iv) in the definition of a 'state and territory industrial law' in s4(1) of the Act. **58** See s645(10) and (11). **59** See s645(8) and (9). **60** Previously s298L(h) read with s298K(1)(a). **61** *Maritime Union of Australia v Patrick Stevedores Operations No.1 Pty Ltd* (1998) 77 FCR 456 affirmed in *Patrick Stevedores Operations No. 2 Pty Ltd v Maritime Union of Australia* (1998) 77 FCR 478; and *Patrick Stevedores Operations No.2 Pty Ltd v Maritime Union of Australia (No. 3)*(1998) 195 CLR 1. **62** See s792(4). **63** *Sydney Morning Herald*, 10 April 2006, p3. **64** See s3(a).

Ingmar Taylor *is a barrister at State Chambers in Sydney.*
PHONE *(02) 9223 1522* **EMAIL** *ingmar.taylor@statechambers.net*